

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

ALPS PROPERTY & CASUALTY
INSURANCE COMPANY, a foreign
insurer

Plaintiff,

v.

KIRK D. MILLER, an individual,
KIRK D. MILLER, P.S., a Washington
Professional Service corporation,
BRIAN CAMERON, an individual,
SHAYNE SUTHERLAND, an
individual, CAMERON
SUTHERLAND PLLC, a Washington
Professional Limited Liability
Company, ISAAC GORDON, an
individual, and ROBINHOOD
FINANCIAL LLC, a foreign Limited
Liability Company,

Defendants.

No. 2:22-cv-00064-TOR

**ALPS PROPERTY & CASUALTY
INSURANCE COMPANY'S
STATEMENT OF MATERIAL
FACTS IN SUPPORT OF ITS
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Plaintiff ALPS Property & Casualty Insurance Company (ALPS) respectfully
submits the following Statement of Material Facts in support of its Motion for Partial

1 Summary Judgment.

2 1. Kirk D. Miller P.S., and Cameron Sutherland PLLC are law firms
3 located in Spokane, Washington. Exhibit 1 and 2 to the Declaration of Stacey K.
4 Smith.

5 2. ALPS issued a PREFERRED Lawyers Professional Liability Policy of
6 Insurance to Cameron Sutherland PLLC, policy number ALPS22052-3 (hereinafter
7 the “Cameron Sutherland Policy”). The Cameron Sutherland Policy was in effect
8 from August 30, 2020, to August 30, 2021. Ex. 1 to Smith Decl.

9 3. ALPS issued a BASIC Lawyers Professional Liability Policy of
10 Insurance to Kirk D. Miller, P.S., policy number ALPS24677-2 (hereinafter the
11 “Miller Policy”). The Miller Policy was in effect from June 1, 2021, to June 1, 2022.
12 Ex. 2 to Smith Decl.

13 4. On or about October 29, 2019, Isaac Gordon (Gordon) filed suit against
14 Robinhood Financial LLC (Robinhood) alleging that Robinhood transmitted or
15 assisted in the transmission of unsolicited text messages to Gordon in violation of
16 the Washington Commercial Electronic Mail Act (“CEMA”) and the Washington
17 Consumer Protection Act (“CPA”). Ex. 3 to Smith Decl., p. 2.

18 5. Gordon was represented by Brian Cameron and Shayne Sutherland of
19 Cameron Sutherland PLLC and Kirk Miller of Kirk D. Miller P.S (hereinafter
20 referred to as “Defendants”). Ex. 3. To Smith Decl. p., 2.

1 6. On November 13, 2019, Robinhood removed the action to Federal
2 Court. Ex. 3. To Smith Decl. p., 2.

3 7. On December 10, 2019, Gordon filed an amended complaint in which
4 he alleged that in July 2019 he received unsolicited commercial electronic text
5 messages promoting Robinhood's brand and services. Gordon further alleged that
6 he did not consent to the text messages. Ex. 3. To Smith Decl. p., 2.

7 8. On November 23, 2020, Gordon filed a motion for class certification.
8 Ex. 3. To Smith Decl. p., 3.

9 9. On January 25, 2021, the Court granted the Class Certification and
10 appointed Gordon as class representative.

11 10. On April 29, 2021, Gordon served his first discovery responses to
12 Robinhood. Ex. 3. to Smith Decl. p., 3.

13 11. In his discovery responses, Gordon claimed that on July 23, 2019, he
14 had received a text message from the phone number 509-990-2672 and that he did
15 not have a relationship with the sender and that he did not provide the sender with
16 his phone number. Ex. 3. to Smith Decl. p., 3.

17 12. In those same responses, Gordon included a screenshot of the text
18 message which included a "nathanb4727" referral code. Ex. 3. to Smith Decl. p., 3.

19 13. Gordon further claimed in his discovery response that he received an
20 additional text message from the phone number 406-202-3711. Gordon also
21

1 provided a screenshot of the text message with the referral code “johnc2246.”
2 Gordon claimed that he was uncertain if he provided the sender with his number. Ex.
3 3. to Smith Decl. p., 3.

4
5 14. After receiving Gordon’s discovery responses, Robinhood immediately
6 began to investigate the 509-990-2672 and the “nathanb4727” referral code.
7 Robinhood was able to determine that the text came from Nathan Budke. Ex. 3. to
8 Smith Decl. p., 3.

9
10 15. It was later determined that Mr. Budke was a friend of Gordon’s class
11 counsel, Brian Cameron’s, son. It was also determined that Mr. Budke was a client
12 of Brian Cameron and Kirk D. Miller in three separate CEMA lawsuits. Ex. 3. to
13 Smith Decl. p., 3-4.

14
15 16. Robinhood also investigated texts received by Gordon dated July 24,
16 2019 from the 406-202-3711 phone number and referral code “johnc2246.”. Ex. 3.
17 to Smith Decl. p., 4.

18
19 17. Brian Cameron subsequently admitted that the text was from his
20 brother, John. Ex. 3. to Smith Decl., p.4.

21
22 18. On June 25, 2021, Robinhood filed a motion to decertify the class and
23 disqualify the class counsel arguing that plaintiff’s counsel, Brian Cameron,
24 organized through family friends, the referral text messages to be sent. Ex. 3. to
Smith Decl., p. 6.

1 19. On July 27, 2021, the District Court granted in part Robinhood's
2 motion, decertifying the class and remanding to State Court. Ex. 4. to Smith Decl.
3 In its Order, the Court noted "serious issues have been raised as to consent and the
4 role that class-counsel and his brother played in initiating the transmittal of the text
5 message that forms the bases of Plaintiff's suit. Further, the stripping of the
6 surrounding text messages and deceptive answers to discovery provide additional
7 grounds to disqualify plaintiff as class representative."

9 20. A subsequent motion for reconsideration was filed. In its decision on
10 the Motion for Reconsideration, the District Court held that the decision to remand
11 was not in error because "Such fraudulent activities that the Court expressed concern
12 over [...], makes the initiation of this action frivolous from the start." Ex. 5. to Smith
13 Decl., p. 7.

15 21. On October 8, 2021 the Superior Court of Spokane County entered an
16 order dismissing the case with prejudice and ordered that "dismissal without
17 prejudice would be pointless and futile because Plaintiff's claim is frivolous" and
18 that "dismissal with prejudice is warranted as a sanction due to Plaintiff's frivolous
19 claim and litigation misconduct." Ex. 3. to Smith Decl., p. 7.

21 22. On October 18, 2021, Robinhood filed a motion seeking sanctions
22 against Cameron Sutherland, PLLC, Kirk D. Miller, P.S., Brian Cameron
23 individually and Kirk Miller individually for its fees expended in defending against
24

1 Gordon's frivolous claim. Ex. 3. to Smith Decl., Decl.

2 23. On March 10, 2022, the Spokane County Superior Court issued an
3 Order on Robinhood Motion for Attorney's Fees. In the Order, the Superior Court
4 held as follows:
5

6 Based on the uncontested evidence in the record, the
7 federal court determined that Mr. Gordon's case was
8 "frivolous from the start." The Plaintiffs requested
9 clarification as to whether the federal court's reference as
such was dicta, Judge Rice unequivocally removed any
doubt that it was *not* dicta.

10 [...]

11 Mr. Gordon and his counsel had been on notice that
12 Robinhood intended to seek sanctions for a frivolous
13 claim. The initial complaint, the amended complaint, the
14 motion for class certification and supporting declaration
15 claimed that Mr. Gordon received an "unsolicited" text
16 message that he "did not consent" and that he did not know
17 where it came from. As ultimately learned in discovery,
18 these statements are not true. Given the close relationships
19 of the people involved in this case and others, it is difficult
to believe those involved did not know that the statements
were untrue. In any event, a reasonable inquiry should
have disclosed the untrue statements. Sanctions are also
warranted under either CR 11 or CR 26(g) for the
inaccurate and misleading discovery responses.

20 Robinhood is entitled to an award of attorney fees and
21 statutory costs. [...]

22 Ex 6 to Smith Decl.

23 24. On July 14, 2022, The Spokane County Superior Court entered an order
24 granting Robinhood's Motion for Sanctions. Ex. 7 to Smith Decl.

1 25. In its order, the Court held that “The federal court’s finding that this
2 case frivolous from the start is sufficient, standing alone, to warrant CR 11
3 sanctions.” Ex. 7 p 9.

4 26. The order also included several findings of facts showing that Gordon
5 and Defendants signed their names to numerous filing that violate CR 11. Of note,
6 the Superior Court held:
7

8 ix. Brian Cameron and Kirk miller also represented
9 Plaintiff Isaac Gordon in *Gordon v. Mod Super Fast Pizza,*
10 *LLC*, Spokane Cnty. Sup. Ct. Case no. 20-2-00148-32
11 (filed Jan 14, 2020), a putative class action involving a
12 refer-a-friend text message that was allegedly sent nine
13 minutes before the John Cameron Robinhood text.
14 [...]Plaintiff alleged that he received a text message from
15 a user who registered the name “Tom Ripley” and the
16 email address 19jkc77@gmail.com. ... This email address
includes the initials for John Kenneth Cameron and his
birth year, 1977, suggesting that John Cameron also sent
Plaintiff the MOD referral text message... After MOD
brought this connection to Brian Cameron’s attention,
Plaintiff voluntarily dismissed his case.

17 [...]

18 9.i.Plaintiff’s Complaint and Amended Compliant
19 contained statements that were not well-grounded in
20 fact or warranted by existing law, including several
21 false statements that text message Plaintiff received
was “unsolicited” and that he “did not consent” to
receive it.

22 [...]

23 9.v. After Plaintiff’s claim-manufacturing came to light,
24 Plaintiff’s counsel Brian Cameron signed and filed a
declaration that included demonstratable falsehoods,

1 including that, to the best of his knowledge, Plaintiff
2 “was uncertain as to the identity of the sender of the
3 [same] test message at issues when he responded to the
4 Defendant’s discovery requests”

5 10. CR 11 sanctions are further warranted because any
6 reasonable inquiry would have involved, at a
7 minimum, reviewing texts between Plaintiff and the
8 sender. Those texts reveal that Plaintiff knew the
9 sender, engaged in friendly text message exchanges
10 both before and after the Robinhood referral text
11 message on which Plaintiff moored his Complaint,
12 and an online search for the sender’s phone number
13 shows that it belonged to John Cameron, Plaintiff’s
14 counsel’s brother. Counsel’s failure to conduct
15 minimal factual investigation is sufficient to impose
16 CR 11 sanctions.

17 11. Further, CR 11 sanctions are necessary to deter
18 Plaintiff and his counsel from fabricating claims in the
19 future. In addition to Plaintiff’s counsel’s misconduct
20 in the case and in *Gordon v. Mod Pizza*, discussed
21 above, Plaintiff’s counsel Brian Cameron, Kirk
22 Miller, and their law firms have initiated several other
23 CEMA based punitive class actions, where plaintiffs
24 claim to have received unsolicited commercial
electronic text messages that appear similarly suspect.
Several of those cases were on behalf of plaintiffs
alleging that they received loyalty program text
messages after visiting multiple cannabis stores on the
same day [...] The plaintiff in one of these cases
testified at his deposition that Brian Cameron drove
him from one store to the next. [...] After the
misconduct of Brian Cameron and Kirk Miller came
to light in these cases, Brian Cameron and/or Kirk
Miller declined to file the previously served
complaints, [...], or voluntarily dismissed the cases
without prejudice, [...]. This is the same tactic
Plaintiff and his counsel employed in this case.

1 Ex. 7. Internal citations omitted

2 27. In addition, the Order entered sanctions against Defendants:

3 [...] Further, the Court SANCTIONS Plaintiff; Brian
4 Cameron individually; Cameron Sutherland, PLLC; Kirk
5 Muller individually; and Kirk Miller, P.S., pursuant to CR
6 11, in the amount of Robinhood's reasonable attorneys'
fees expended in defending this case from inception.

7 Ex. 7

8 28. On May 17, 2021, Cameron Sutherland submitted a Notice of New
9 Claim or Potential Claim to ALPS regarding the Robinhood litigation. Ex. 8 to Smith
10 Decl.

11 29. ALPS issued a PREFERRED Lawyers Professional Liability Policy of
12 Insurance to Cameron Sutherland, policy number ALPS22052-3. The Cameron
13 Sutherland Policy was in effect from August 30, 2020, to August 30, 2021. The
14 Cameron Policy provides a \$100,000 each claim limit and a \$300,000 aggregate
15 limit Ex .1

16 30. The Cameron Sutherland Policy contains the following Insuring
17 Agreement:
18

19 SECTION 1 – INSURING AGREEMENTS

20 A. COVERAGE

21 Subject to the **Limit of Liability**, exclusions, conditions
22 and other terms of this **Policy**, the **Company** agrees to
23 pay on behalf of the **Insured** all sums (in excess of the
24 **Deductible** amount) that the **Insured** becomes legally
obligated to pay as **Damages**, arising from or in

1 connection with A **CLAIM** FIRST MADE AGAINST
2 THE **INSURED** AND FIRST REPORTED IN
3 WRITING TO THE **COMPANY** DURING THE
4 **POLICY PERIOD**, provided that all of the following
5 conditions are satisfied:

- 6 1. The **Claim** arises from a **Wrongful Act** that occurred
7 on or after the **Retroactive Coverage Date** set forth
8 in Item 2 of the **Declarations**;
9 [...]

10 Ex. 1. ALPS-LPL-PREFERRED (01-18) p. 2.

11 31. The Cameron Sutherland Policy contains the following Definitions
12 pertinent to the above-described Insuring Agreement:

13 C. **Claim** means a demand for money or services
14 including, but not necessarily limited to, the service of suit
15 or institution of arbitration or alternative dispute resolution
16 proceedings against the **Insured**.

17 [...]

18 G. **Damages** means any:

- 19 1. Monetary award by way of judgment or final
20 arbitration, or any settlement; and
21 ...

22 **Damages** does not mean nor include any:

- 23 3. Punitive, multiple, or exemplary damages, fines,
24 sanctions, penalties or citations, including, without
limitation, any consequential or incidental damages,
attorney's fees or costs, or pre-judgment or post-
judgment interest resulting therefrom, regardless
against whom the same are levied or imposed and
regardless of whether the same were levied or imposed
in a separate matter or proceeding;

1
2 [...]

3 Y. **Professional Services** means services or activities
4 performed for and on behalf of the **Named Insured** or
5 a **Predecessor Law Firm** and rendered solely to
6 others as:

- 7 1. An **Attorney** in an attorney-client relationship on
8 behalf of one or more clients applying the
9 Attorney's specialized education, knowledge, skill,
10 labor, experience and/or training, including pro
11 bono services;

12 [...]

13 BB. **Wrongful Act** means an actual or alleged:

- 14 1. Act, error or omission in **Professional Services**
15 that were or should have been rendered by the
16 **Insured**; and
17 2. ...

18 Ex. 1. ALPS-LPL-PREFERRED (01-18) p 3-8.

19 32. The Cameron Sutherland Policy contains the following fraudulent act
20 exclusion:

21 SECTION 3 – EXCLUSIONS

22 THIS **POLICY** DOES NOT APPLY TO ANY **CLAIM**
23 ARISING FROM OR IN CONNECTION WITH:

- 24 A. Any dishonest, fraudulent, criminal, malicious, or
intentionally harmful wrongful or harmful act, error or
omission committed by, at the direction of, or with the
consent of an **Insured** [...]

[...]

Ex. 1. ALPS-LPL-PREFERRED (01-18) p. 8.

33. On October 26, 2021, Kirk D. Miller P.S. submitted a Notice of New Claim or Potential Claim to ALPS on the basis of the allegations in the Robinhood Motion for Attorney's Fees. Ex. 9 to Smith Decl.

34. ALPS issued a BASIC Lawyers Professional Liability Policy of Insurance to Kirk D. Miller, P.S., policy number ALPS24677-2. The Miller Policy was in effect from June 1, 2021, to June 1, 2022. The Miller Policy provides a \$500,000 each claim limit and a \$500,000 aggregate limit. Ex. 2.

35. The Miller Policy contains the following Insuring Agreement:

SECTION 1 – INSURING AGREEMENTS

A. COVERAGE

Subject to the **Limit of Liability**, exclusions, conditions and other terms of this **Policy**, the **Company** agrees to pay on behalf of the **Insured** all sums (in excess of the Deductible amount) that the **Insured** becomes legally obligated to pay as **Damages**, arising from or in connection with A **CLAIM FIRST MADE AGAINST THE INSURED AND FIRST REPORTED IN WRITING TO THE COMPANY DURING THE POLICY PERIOD**, provided that all of the following conditions are satisfied:

1. The **Claim** arises from a **Wrongful Act** that occurred on or after the **Retroactive Coverage Date** set forth in Item 2 of the **Declarations**;
[...]

Ex. 2. ALPS-LPL-BASIC (01-21) p. 2.

1 36. The Miller Policy contains the following Definitions pertinent to the
2 above-described Insuring Agreement:

3
4 C. **Claim** means a demand for money or services
5 including, but not necessarily limited to, the service
6 of suit or institution of arbitration or alternative
dispute resolution proceedings against the **Insured**.

...
7

8 G. **Damages** means any:

9 1. Monetary award by way of judgment or final
10 arbitration, or any settlement; and

...
11

Damages does not mean nor include any:

...
12

13 3. Punitive, multiple, or exemplary damages,
14 fines, sanctions, penalties or citations,
15 including, without limitation, any
16 consequential or incidental damages,
17 attorney's fees or costs, or pre-judgment or
18 post-judgment interest resulting therefrom,
regardless against whom the same are levied
or imposed and regardless of whether the
same were levied or imposed in a separate
matter or proceeding;

19 X. **Professional Services** means services or
20 activities performed for and on behalf of the
21 **Named Insured** or a **Predecessor Law Firm** and
rendered solely to others as:

22 1. An **Attorney** in an attorney-client
23 relationship on behalf of one or more clients
24 applying the **Attorney's** specialized
education, knowledge, skill, labor,

1 experience and/or training, including pro
2 bono services;
3 [...]

4 **Z. Wrongful Act** means an actual or alleged:

5 1. Act, error, or omission by the **Insured** in the
6 performance of **Professional Services**; and
7 [...]

8
9 Ex. 2. ALPS-LPL-BASIC (01-21) p. 3-8.

10 37. The Miller Policy contains the following Dishonest and Fraudulent Act
11 exclusion:

12 SECTION 3 – EXCLUSIONS

13 THIS **POLICY** DOES NOT APPLY TO ANY **CLAIM**
14 ARISING FROM OR IN CONNECTION WITH:

15 A. Any dishonest, fraudulent, criminal, malicious, or
16 intentionally harmful **Wrongful Act** committed by, at
17 the direction of, or with the consent of an **Insured**;

18 Ex. 2. ALPS-LPL-BASIC (01-21) p. 8
19
20
21
22
23
24

1 DATED this 4th day of August 2022.

3 LETHER LAW GROUP

4 s/ Eric Neal

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10 *Insurance Company*

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the following party(ies):

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By: ☐ First Class Mail ☒ ECF/Email

DATED this 4th day of August 2022 at Seattle, Washington.

s/ Judy Tustison
Judy Tustison | Paralegal